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Joint custody in the light of bioethics and biolaw

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Abstract

Family is the founding basis of society and the best place for the education and growth of children. Divorce is deleterious to children's health, mainly impacting their mental health and school performance, in addition to having impacts on adulthood. Living both with the father and the mother for an equal period of time after divorce – joint custody – guarantees empirically proven benefits to the physical and psychological well-being of children. However, judicial decisions decree joint custody in less than a third of separations. By analyzing ethical and moral controversies in the interrelation of legal sciences and health sciences, biolaw makes bioethics effective. Thus, it is discussed that family lawsuits should follow multidisciplinary criteria that consider children as vulnerable subjects who need protection.

Keywords: Divorce. Anxiety, separation. Child development. Parenting. Minors.

Resumo

Guarda compartilhada à luz da bioética e do biodireito

A família é a base fundante da sociedade e o melhor local para a educação e o crescimento da criança. O divórcio é deletério à saúde das crianças, impactando sobretudo na saúde mental e no desempenho escolar, além ter reflexos na vida adulta. O convívio por período igualitário com pai e mãe após o divórcio – a guarda compartilhada – garante benefícios, empiricamente comprovados, ao bem-estar físico e psicológico das crianças. No entanto, muitas decisões judiciais decretam guarda compartilhada em menos de um terço das separações. Ao analisar controvérsias éticas e morais na inter-relação das ciências jurídicas com as ciências da saúde, o biodireito faz com que a bioética tenha eficácia. Por esse motivo, argumenta-se que ações judiciais de família devem seguir critérios multidisciplinares que considerem as crianças como sujeitos vulneráveis que precisam de proteção.

Palavras-chave: Divórcio. Ansiedade de separação. Desenvolvimento infantil. Poder familiar. Menores de idade.

Resumen

Custodia compartida a la luz de la bioética y el bioderecho

La familia es la base de la sociedad y es el mejor lugar para la educación y el crecimiento del niño. El divorcio es perjudicial para la salud de los niños, especialmente afecta la salud mental y escolar, con repercusiones en la vida adulta. Vivir juntos por un período igual con el padre y la madre después del divorcio, la custodia compartida, es un elemento con una relación causal estadística para proteger la salud de los niños. Sin embargo, las decisiones judiciales han decretado la custodia compartida en menos de un tercio de las separaciones. Bioderecho es una forma de hacer que la bioética sea efectiva, mediante el análisis de controversias éticas y morales en la interrelación entre las ciencias jurídicas y las ciencias de la salud. Las acciones legales familiares deben llevarse a cabo de manera multidisciplinaria, considerando al niño como el sujeto más vulnerable a proteger.

Palabras clave: Divorcio. Ansiedad de separación. Desarrollo infantil. Responsabilidad parental. Menores.

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In the 1988 Brazilian Constitution, family is considered as the founding basis of society and, in its Article 226, asserts that it *has special protection from the State*[1]. But despite being considered by many to be the best place for the child's full development, the family is not necessarily a stable institution[2]. This is evidenced by divorce rates, which have substantially grown from the 1960s onwards, remaining stable at a relatively high rate since the 1980s – about 30% of marriages end before five years of union, and just under half last more than 20 years[3].

Divorces require interventions by the Judicial Branch, which involve more than monetary assets and values, but practices related to the children's health and development. For this reason, according to the definition by Lumertz and Machado, in which biolaw *aims to analyze conflicts and controversies related to legal and medical sciences, including the field of morality, to serve as grounds for decisions that imply any connection with life and health, family lawsuits should be understood in the light of broad and multidisciplinary debates*[4].

Moreover, according to Barboza[5], law is an expression of collective will, which, besides being interconnected system of rules and categories, conveys moral values. If, in general, law has the power to define and resolve the social order, within the family scope, legal regulation raises questions that will often not be resolved in the strictly judicial sphere[6,7]. The fundamental values of the legal system – life, human dignity, freedom, equality, protection, solidarity – are expressed in a universal and abstract manner[8], constituting, within the family, a conception and moral paradigm of what the father and mother roles are in protecting and educating children after divorce[7].

In family law, the complexity and subtlety of concrete cases often bring elementary principles into conflict, for instance, a possible process in which the principle of family power as paramount in the education of children clashes with the protection against abusive attitudes on the part of family members. Good decisions in family law require, therefore, a thorough knowledge not only of the legal system, but also of data from multidisciplinary studies on family dynamics – sociology, demography, mental health, etc.[9].

In turn, reflections in the field of biolaw are also complex, as they dialogue with heterogeneous fields of knowledge such as health and law[4,8]. According to Brito and Ventura[10], biolaw is a way of making bioethics effective, since it has the power to affect reality, playing a role in indicating appropriate procedures so judicial decisions have the best chances of resolving or minimizing problems arising from family conflicts, especially concerning the well-being of minors.

Brief history of custody after divorce

Historically, societies address the formation and dissolution of marital bonds under three paradigms: discouragement of divorce; distribution of the couple's property; and child protection[11]. In Classical Antiquity, in geographically distant societies, such as Greece, Rome, and China, marriage and divorce were considered a private matter for men and women[12]. Codes varied in their specificities, but overall, the man could divorce the woman and return her, with the dowry, to her parents' home. In some cases, the wife could freely divorce; in others, committee approval or proof of domestic violence was required[13]. Interestingly, the wife's father could, at any moment, apply for divorce, reclaiming his daughter and the dowry.

Children, in turn, were regarded as paternal property, at least in patrilineal, patriarchal or patrilocal societies economically based on agriculture, which depended on their labor to aid in production[14]. This rule, however, was not so strict. Thompson[15] resumes a judicial process from Ancient Rome in which the children's custody was granted to the mother, as she was able to prove that the father was an alcoholic and unfit for work.

Since ancient times and throughout the Middle Ages, the issue of distribution of property and inheritance caused complex conflicts when confronting children born during marriage, children born to divorced couples, and children born to adulterous relationships[16]. In China, around 200 B.C., Emperor Qin Shi Huang ordered his subjects to maintain the stability of families[12].

In medieval Europe, the Catholic Church managed to gradually introduce the prohibition of divorce into legal codes. If a couple wanted to annul their marriage, they had to prove very specific situations (such as consanguinity, document fraud, age below the minimum acceptable, etc.) and the procedure was quite expensive – which of course did

not prevent adultery and abandonment of home. Nor was there any legal protection for children [11].

During the Industrial Revolution (18th-19th centuries), England underwent a process of rapid demographic growth, migration of the rural population to urban areas, and formation of large industrial cities, where inhabitants suffered from marginality, misery, epidemics, juvenile delinquency, and urban violence. Amidst social control policies, the child custody law was reformulated in 1857, consolidating the legal concept of alimony [16].

Besides the lack of effective contraceptive methods, a considerable part of the work done by women and young people did not take place in rural areas, but in insalubrious factories totally incompatible with the needs of the pregnancy and puerperium stags, as well as childhood. The social division of intrafamily labor between provider father and caregiver mother was thus, in that context, a social advance and a form of child protection.

While Europe institutionalized profound changes in family law, in Brazil, the first Civil Code – Law No. 3,071/1916 [17] – devoted 144 articles to regulate marriage and only three articles to child custody. This law kept rules that had been in force since the colonial period, such as the return of the dowry to the wife in case of judicial separation and paternal custody of boys aged over six years and girls of legal age.

Moreover, the Civil Code differentiated, for inheritance, custody and alimony purposes, between "legitimate" and "illegitimate" children, so that children born outside marriage were not entitled to inheritance or alimony and, in turn, the relationship of "illegitimate" children with the father could be prohibited.

In the 1940s, the law was reformed: Decree-Law No. 3,200/1941 [18] established paternity recognition for inheritance rights to children outside marriage. A few years later, journalist Assis Chateaubriand, in order to gain custody of his daughter Teresa, forced then-president Getúlio Vargas to issue two decrees modifying details in the child custody regime: Decree-Law No. 4,737/1942 [19]; and Decree-Law No. 5,213/1943 [20], which were crudely called the "Teresoca Law."

These decrees modified Article 16 of the 1941 Decree-Law, establishing custody preferably to the father in the following terms: *The natural child, while a minor, shall remain under the power of the parent who recognized him or her, and, if both parents recognized him or her, the child shall be under the power of the father, unless the judge decides otherwise, in the interests of the minor* [19,20]. In 1962, Law No. 4,121/1962 [21] amended provisions of the1919 Civil Code, providing for the legal status of married women and, regarding children, regulating that women would not lose their family power over them in the case of remarriage.

The 1960s combined mediation through penicillin and new antibiotics for sexually transmitted diseases with the emergence of the contraceptive pill and a myriad of social movements, which profoundly changed values regarding marriage, divorce, and childcare. While in Europe and the United States what is today known as "joint custody" was being formulated, that is, the living arrangements of children in a balanced time with both their father and mother, in 1970, in Brazil, custody was decreed to be preferably maternal. According to Article 1 of Law No. 5,582/1970, *the natural child, while a minor, shall remain under the power of the parent who recognized him or her and, if both parents recognized him or her, the child shall be under the power of the mother, unless such a decision harm the minor* [22].

Brazil updated its marital laws in 1977 with Law No. 6,515/1977 [23]. Of its 54 articles, five were devoted to alimony issues and eight to child custody. Articles 10 and 15 guaranteed the mother custody of the children and the father the right of visitation and the element of "supervision" [23]. Brazil is considered to have belatedly established a legal post-divorce living arrangements regime, since a similar regime had already been established approximately a century earlier in England, but which was then under profound social and legal questioning [11]. Recently, Law No. 12,318/2010 [24], which addresses parental alienation, and Law No. 13,058/2014 [25], which decrees the rule of joint custody with balanced living arrangements between parents, came into force in Brazil.

Divorce impacts: child health and well-being

Divorce negatively impacts children's health. In the early 20th century, before the discovery of antibiotics and mass vaccination programs,

children of divorced parents were at higher risk of mortality [26]. When analyzing current statistics on mental health and school well-being, children of divorced parents, compared with those from stable families, are more likely to develop psychiatric and behavioral disorders, such as school dropout, drug addiction, smoking, unplanned pregnancy, among others [27-29] – even the incidence of psychiatric disorders, with the prescription of psychotropic drugs, is higher in adolescence [27-29].

Damages resulting from the impact of divorce are thus not restricted to childhood, but pervade adulthood, and it is worth highlighting that such health disorders also occur in children who grew up under parental marital stability. Still, we assert that in the context of divorce, there is a significant epidemiological risk, in which not only do these events tend to occur more frequently, but also the severity tends to be greater [27-29].

Current data corroborate the knowledge consolidated since World War II, when Fagan and collaborators [30] evaluated European data and concluded that the father's presence at home is important to the mental and behavioral health of children – a presence not replaceable by a stepfather. Such results are similar to those for motherless children. In summary, besides economic support, the presence of a father and mother in the home is a key element for the child's development – except in drastic cases such as psychiatric disorder, drug addiction, and domestic violence.

Besides the psychological impact on the child's health, divorce also raises the risks of economic problems in the family. In Europe and North America, for example, households within the poverty line are characterized by children and their divorced mothers due to paternal abandonment, both affective and material [2]. Gahler and Palmtag [27] and Gratz [31] analyzed data on children of divorced parents of higher social status and concluded that, even in a reasonable economic standard and school performance, we see an unfavorable epidemiological impact on mental/psychic health and drug addiction, for example, greater propensity to drug addiction and higher incidence of psychic symptoms treated with medication.

According to Biblarz and Stacey [32], in Western countries, about 80% of children of divorced parents live under maternal custody. The profile of children who are under paternal custody presents some peculiarities:

- The father who files judicial processes for custody has a higher socioeconomic level, so that divorce and childcare do not represent a drop in the social status;
- Paternal custody tends to be granted when: 1) there are serious social and behavioral disorders on the part of the mother; 2) children are older; 3) in case of adolescents and preadolescents with aggressive behaviors, often against the mother [32].

Population studies tend thus to consider the minority of children who are under sole paternal custody as a specific subset. Hence, these variables must be considered in epidemiological studies involving child custody.

The issue of divorce concerns the children's health, and this problem is mediated not by the usual health structures (clinics, hospitals, etc.), but by the Judicial Branch. Risks from dissolution of marriage do not reveal by themselves a perfectly delimited situation, since it is a possibility that accompanies minors for years and with potential negative impacts.

Moreover, the mental processes resulting from divorce in children are not usually explicitly perceived, as they often behave "as if everything is fine" and they are already adapted to the new routine. In this regard, epidemiology shows us that the psychological impacts of adulthood are related to the accumulation of absences and deprivations of affection suffered by children and adolescents of divorced parents.

Contested divorce: parental alienation

Marital separation consists in a tense and dramatic period, but contested divorce can be aggressive, even including criminal lawsuits, invariably leading to the phenomenon of parental alienation [33,34] – that is, the attempt by one or both parents to cause psychological suffering to others by, for example, preventing the relationship with their children [35,36]. Thus, although the impediment requires serious facts of violence/neglect, many of the contested divorce processes are based on unfounded, fanciful accusations, with overestimation of irrelevant facts that disqualify and remove the former spouse from contact with the children [37,38].

Such processes, according to a survey by Amendola [37], reach large proportions in family courts.

The profusion of obscure and borderline cases is detrimental to children who effectively suffer abuse and mistreatment, since they cast doubt on many real complaints of alienation or abuse. Case evaluation is subtle, requires adequate preparation of legal agents and the application of extensive protocols to prove and distinguish them from those intentionally fabricated and stemming from emotional disorders related to divorce [39].

According to Bernet, Baker, and Verocchio [40], the greatest victims of parental alienation are children themselves. For them, the most distressing complaint of children is being involved in the conflict and forced to make moral and value-based decisions about who is right or wrong, who was the aggressor or the victim in the separation process. Moreover, epidemiological surveys show that in adulthood, marks, recollections, and mentions of systematic and recurrent exposure to parental alienation behaviors (Table 1) are related to higher incidence and severity of psychological symptoms (depression, anxiety, paranoid ideation, etc.) compared with the group of adults children of divorced parents who did not report such memories [41].

In other words, acts of parental alienation are epidemiologically typified as acts of violence against children [33-41], because they represent a potential harm to health. Waiting until adulthood to medicalize disorders is not a responsible and ethical path. One must anticipate and examine the causal factors present in the conflicting interrelation between former spouses and its interface in the development of children's lives.

Table 1. List of some behaviors characterized as acts of parental alienation

Denigrating the image of the other parent
Limiting contact with the other parent and/or their family members
Hindering or preventing communication between the child and the other parent
Hindering or preventing access to photographs of the other parent
Showing affective unappreciation when the child mentions the other parent
Inducing the child to spy on the other parent
Causing the child to consider the other parent as dangerous
Causing the child to reject the other parent
Leading the child to keep secrets and confidences
Introducing the new spouse as the "new father" or "new mother"
Withholding the child's medical, academic, and social information from the former spouse
Denying the former spouse from access to the child's medical appointments, social gatherings, and school/sporting events
Involving children in intimate divorce-related issues of the couple
Changing the child's name by removing the other parent's last name
Fostering dependent behavior towards oneself in the child
Encouraging the child to disrespect the other parent's authority

Source: Law No. 12,318/2010 [24] and Bernet, Baker, and Verocchio [40].

Joint custody: health outcomes

Joint custody emerged around the 1970s from arrangements made by the couples themselves, including among those who did not necessarily maintain a good relationship after the divorce [42]. In other words, it emerged not from state initiative, but rather from experiments of citizens themselves, expressing social and marital equality values.

In these experiences, the living arrangements routines with the father and mother were diversified, according to the specificities of each former couple, such as the alternation of weeks, fortnights, months, semesters, and even years. In all cases, the school plays a central role in the distribution of living arrangements: the easier the access of both parents to it, the more effective are the living/joint custody arrangements [6,42].

Despite the courts' objections to decreeing or ratifying joint custody agreements [42], Bauserman's meta-analysis [43] showed, in 2002, that this arrangement is statistically homogeneously related to better mental health and academic outcomes than sole custody. Concerning juvenile delinquency and school dropout, joint custody presented the same degrees of social maladjustments compared with intact families, both being significantly lower than sole custody [44]. These studies statistically codified that children raised without one parent have a greater tendency towards marginality.

Since the beginning of the 21st century, several countries have adopted laws making joint custody the standard for children after divorce. This is corroborated by more recent meta-analyses and systematic reviews, but with larger samples – over 27,000 children in different countries (United States, Canada, Norway, Sweden, Netherlands, and Australia) [43-48]. The results are consistent in all social strata, with joint custody being superior to sole custody in the analyzed outcomes: school performance, juvenile delinquency, unplanned pregnancy, smoking, alcohol consumption, and drug addiction [43-48].

Braver and Votruba [49] point out that these results present a statistical causality relationship, that is, regardless of the degree of conflict between the former couple after the divorce, the maintenance of living arrangements with the father and mother for an equal (or almost equal) time is one of the defining elements for protecting the children's mental health and school well-being. This is especially true when former couples fail to achieve a minimally harmonious relationship.

Importantly, mental health is a matter of many and complex variables, and statistical investigations show that, although consistent, joint custody is a mild-to-moderate element in preventing mental disorders in children [49].

Difficulties in implementing joint custody

The word "custody" possesses a semantic difference between legal environments and health studies. Within the legal scope, "custody" concerns decision-making power, whereas in public health terms, it refers to relationship [6]. This heterogeneity of meaning generates biases in public health, since usually a judge decrees joint custody in which one of the parents have living arrangements with the child for only one weekend per fortnight [50].

Consequently, with the routine consolidation of judicial decisions, the literature has pointed out, for epidemiological studies, that joint custody is defined only when the parents have living arrangements with their children for an equal period of time [45]. For preschool/school-age children (over 1.5 years old), Bergstrom and collaborators [51] described that the most common living arrangement (about 40% of cases) is one week in each parent's home, with some couples having more fragmented living arrangements.

With the consolidation of scientific-epidemiological knowledge and laws in force, joint custody has been decreed with increasing frequency. Nevertheless, it still represents a minority of decisions in Brazilian family courts – about five years after the enactment of Law No. 13,058/2014 [25]. Thus, approximately 28% of the 2019 judicial decisions were in favor of joint custody [52], indicating that the judicial system acted as the first obstacle.

According to Brito and Gonsalves [50], second instance decisions have not favored the rule of joint custody based on scientifically refuted arguments, such as: joint custody would be ineffective and cause problems; weekly or biweekly living arrangements would constitute alternate custody, which is harmful to children; joint custody work only in situations of cooperation between father and mother; changing living arrangements would generate adaptation disorders for the child, especially after prolonged periods of sole custody; and – most paradoxically –, the former couple should be in harmony – a highly unlikely fact, since people in harmony do not tend to seek judicial mediation.

The Superior Court of Justice has ruled sometimes in a manner consistent with scientific knowledge and sometimes in a manner that maintains the primacy of sole maternal custody. In granting joint custody, the Special Appeal No. 1,251,000/2011 [53] argued that an agreement between the former couple was unnecessary to decree joint custody, and detailed a mechanism for equitable distribution of living arrangements: alternate weekends (four days a week with a parent, three days a week with the other), reversing the arrangement the following week.

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Special Appeal No. 1,560,594/2016 [54], ruled similarly. In 2017, another special appeal (whose full text was not disclosed) [55], based on the absence of records of violence against the children, granted joint custody in a situation where marital physical violence was reported.

In 2016, however, the Superior Court of Justice ruled against joint custody in two situations: first, because the former couple lived in distant cities, which is understandable [56]; second, it argued that the *immaturity and litigation of the former couple prevented making decisions of any nature about the child's routine* [57]. The latter referred to the parent who, for being an alcoholic, was about to lose parental power, which was enough to contraindicate joint custody. In 2021, the Superior Court of Justice, through Special Appeal No. 1,877,358/2021 [58], ratified the primacy of joint custody, but without mentioning the regime of living arrangement between children and parents.

In turn, Sweden judicially decrees more than 90% of the custodies as joint [45]. In France, 95% of joint custodies are decreed under a conciliation regime, and, when there is a judicial process, about 50% of the time joint custody prevails [59].

Numerous factors may explain such discrepancies, but overall, in countries where joint custody has become the legal norm, there have been initiatives from the Executive Branch via the ministries of health and associated bodies. That is, the health initiative in these countries seems to have created a much more favorable legal environment for joint custody than in countries where it is advocated only by social groups or by general legal principals of citizen equality [49,51].

In overcoming the legal obstacle, Bergstrom and collaborators [45], Wadsby, Priebe, and Svedin [48], and Carlsund, Eriksson, and Sellstrom [60] argue that even though the Swedish legal system decrees joint custody as the standard, there has been, after a few years, a proportion of 30% to 40% of children who actually live for a balanced time with both father and mother. In other words, the male sociocultural dynamics continues to predispose that the father, once divorced, distances himself not only from his ex-wife, but also from his children [28,30].

In fact, economic instability is the main element of paternal withdrawal, so that, after the divorce, the subgroup of children from lower income families suffer a double vulnerability: a drop in income levels and affective abandonment [28,30].

Biolaw and family conflicts

Living arrangements after divorce present in marital laws still involve conflicting situations not covered by legislation, particularly concerning the core of the family's private life and the vulnerability of dependents. In this regard, the State's protection has limitations when joint custody requires a different and horizontal look at the interests of a situation of fragility in the field of care and responsibility for the child.

Strong [7] proposes the perspective of bioethics of protection [61] for children of divorced parents. The author also recognizes the existence of several possible family arrangements, and that arrangements different from the traditional model (father, mother, and children) often find it difficult to be included in social programs; that many families consist of the mother and her children, with paternal absence; and that, with the dissolution of marital bonds, the father and mother roles are resignified and reformulated.

Dias [9] considers that social and cultural changes in families occur at a faster pace than the legal field is able to follow. The situation of joint custody in Brazil, however, contradicts this perspective, since the legislation on joint custody emerged as an innovation based on solid scientific and legal knowledge, but somewhat opposed to entrenched values and practices dated from over four decades, guided by the Divorce Law of 1977 [23].

For Dias [9], family law is arduous because it deals with the feelings and soul of the subjects involved. Traditionally, family judges are obliged to make decisions for which the current legislation has gaps. Consequently, their decisions must be based on ethical and moral principles, thus being a fertile ground for bioethics and biolaw.

The current mismatch between the Joint Custody Law [25] and its effective application, however, points to the need for a bioethical dialogue between the legal norm, moral values, ingrained habits, and consolidated scientific knowledge on the best custody model for children.

Given the delicacy and complexity of the real object of action of family law – affection –, Dias [9] resorts to the foundations of biolaw in addressing the conflict of principles or collision between fundamental rights. For the best possible application of legal instruments, the principle of proportionality must prevail over the principle of strict legality, and one must preserve momentarily-antagonistic guarantees. If two principles apply to the same specific case, the best solution must consider the relative weight of each one, that is, ponderation between the principles is the guiding principle, and not only the choice of one principle over the other.

Dias [9] is resolute on this issue by stating that family judicial decisions made at the margin of social and scientific evolution cause an enormous disservice to society as a whole. Hence, a multidisciplinary approach, a focus on bioethics and biolaw by family law professionals, is indispensable. Such approach is rarely required in professional selection exams, despite the Joint Custody Law has dictated rules on supervision in matters or situations that directly or indirectly affect children's physical and psychological health and education (§5, Art. 1.583) [25].

Law professionals are faced with many litigation processes in which there is a feeling of pain, abandonment, and frustration on the part of litigants. For Póchnno, Paravidini, and Cunha [62], these are heartaches and resentments that are expressed in attitudes of parental alienation and present the psychological impact on the part of the alienator, who, unable to cope with the grief of separation, makes room for inner fantasy and conflict, resulting in a situation of irreconcilable actions expressed in violent behaviors that affect all elements involved in the context.

The alienating individual's motivation follows two paths: the apparent motive, which is revenge, and the determining motive, which denounces the unconscious in illogical acts commanded by desires and drives. Nonconformity with the rupture and the mourning process is expressed by sadistic-obsessive symptoms in consonance with fantasies of domination, the alienator's destructive desire being intense, manipulated by creative performances. Such pathological expressions affect the child, albeit unintentionally.

Parental alienation, therefore, challenges laws involving the family in terms of protecting the vulnerable. This element demonstrates the reversal of roles regarding what is understood as a child's right, both concerning the need for bonds with the father and mother and the exposure to a conflict between adults. The child's developing personality is unable to adequately assess the fragmenting conflict in a process of rupture between love, anger and loyalties, involving a subtle violence against them – parental alienation.

The situation of joint custody in Brazil becomes more acute when, according to Dias [9], the Brazilian doctrine defends responsible parenting, in which the living arrangements and relationship between parents and their children is a child's right. Now, where there is a right, there is a duty [63], and if it is the child's right to live and interact with their father and mother, then there is the duty to live and interact on the part of the adult.

Dias [8] recognizes that distancing and even breaking the bond of affection between parents and children produces emotional and psychological sequelae that can compromise their well-being and development, besides permanently impacting their lives. The emotional damage resulting from the parent's failure to fulfill the duties arising from parental power, failing to meet the duty of spending time with the child, produces emotional damage worthy of reparation [9]. Now, if this is the doctrinal framework, it is paradoxical that joint custody does not account for even half of the judicial decisions in Brazil.

Assessment of the seriousness of conflicts present in divorce, especially those of high litigation, is a topic in which law and health are indistinct in predicting the consequences for future social and family life, which cannot disregard a broad consensus on the fragile nature of dependents and the need for special protection. Joint custody, from an ethical standpoint, is deemed as a means of prevention in the scope of the child's mental health and school well-being, since the results are long-term and often forgotten before the typically childish behavior of playing and always seeming to be happy and well.

In this intersection between ethics, health, and justice, Biolaw allows to understand the

distinct reasons and social values involved in examining these fields of knowledge. Hence, biolaw, due to its guiding and pedagogical character, enables discussions that are relevant for establishing reliable and balanced references in the construction of new discourses, as in the troubled issue of divorce and parental alienation – which, due to its negative impact on childhood, requires maximum mitigation and prevention by joint custody.

Bioethics and biolaw reflections focus thus on the child as a subject to whom legal measures must protect, and health is an essential condition of this quality. To this end, proper relationship with the mother and father, as well as with extended family members, is paramount. But despite the legal regulations on divorce and all the advancement of social and legal debates on the topic, marital separations often unfold in conflicts not understood – and perhaps unattainable – by legal measures.

There is, therefore, a limitation in the scope of the State, since the end of judicial processes does not necessarily mean a resolution of disagreements and family pacification. It is argued, however, that there may be a change to a more complex level, in which we see an expansion of conflict territories that ends up following the child's development.

The figure of the State, here materialized in the family courts, has a strong impact in terms of public health. Joint custody, understood as the relationship and living arrangements of the child or adolescent for the most egalitarian periods possible between the father and the mother, consists in a public health measure that is not implemented by the State's health structures, but rather by its legal structures.

But although law professionals tend to be less familiar with health-specific scientific language, legal orders have paradoxically denied joint custody based on assumptions of effects on children's health [49]. Decisions such as these warn us to the importance of biolaw as an appropriate arena to refine and develop this dialogue. In this regard, Martinez and Albuquerque mention the principle of international law that recommends that *countries should provide evidence-based programs to promote healthy lifestyles and reduce common risk factors* [64].

As Strong concludes [7], in the separation process, the logic of the conflict further exacerbates differences, even in situations where there was previously mutual respect for the roles of father, mother, and children in the family context. The state apparatus used to deal with the effects of divorce is, however, still based on old norms, which do not include the current requirements for scientific-epidemiological evidence in protecting children's life, especially when exposed to situations.

Final considerations

The new conceptions of family capable of meeting the new emerging morals point to the concept of responsibility towards children and adolescents, especially when the current archetypal structure directly interferes with and affects new forms of family structure and living arrangements. By enabling the questioning of the complex reality of everyday life, bioethical reflection can positively influence the decisions to be made, preventing, anticipating, and assisting in conflict resolution.

In this *locus*, the role of parents, children, and others in the family structure should be considered in its atomized form, recognizing vulnerable potentials, without superficial interventions or those based on prejudice. Each part has its role and importance in the dependent's development, who must be protected for being situated in another context and role within the family dynamics – especially when no critical framework, freedom of thought or choice exists. That is, besides the bioethical reflections on physical, explicit violence against children [65], affective abandonment and parental alienation are insidious forms of violence to which children are exposed.

The issue of child custody after divorce is undergoing profound changes. Bioethical reflections allow to rethink State intermediation, considering new possibilities of peaceful living arrangements, essentially protected within the legal context and its limitations, prioritizing measures that are concerned with the physical and psychological health and education of minors involved in the process.

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